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In The

Supreme Court of the United States

October Term, 1997

CITY OF IRVINE, CHIEF OF POLICE CHARLES S. BROBECK, OFFICER TROY GIELISH, OFFICER SHIRLEY SUMNER, OFFICER ROBERT LANDMAN, CALIFORNIA FORENSIC PHLEBOTOMY, INC.,

Petitioners,

v.

DAVID SCOTT NELSON, and MAURICIO BAEZ FERNANDEZ, on behalf of themselves and on behalf of others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED

The question presented is whether a person arrested on probable cause of drunk driving has a Fourth Amendment right to the chemical test of his choice to determine his blood alcohol level.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Irvine, Chief of Police Charles Brobeck, Officer Troy Gielish, Officer Shirley Sumner, Officer Robert Landman, and California Forensic Phlebotomy ("Petitioners"), respectfully request that a writ of certiorari issue to review the Ninth Circuit's decision in this proceeding.

OPINIONS

The Opinion of the United States Court of Appeals for the Ninth Circuit is certified for publication but has not yet been officially reported. *See Nelson, et al. v. City of Irvine, et al.*, No. 96-56813, 1998 U.S. App. LEXIS 8833 (9th Cir. May 6, 1998) (reprinted in Appendix 1a.) The Order denying Respondents' Petition For Rehearing is reprinted at Appendix 1c. On June 24, 1998, the Ninth Circuit issued an Order staying the mandate. The Ninth Circuit's decision affirmed in part and reversed in part the Order of the United States District Court for the Central District of California entered on October 23, 1996. The district court's Order is reprinted at Appendix 1b.

JURISDICTION

The Ninth Circuit issued its judgment and opinion on May 6, 1998. (App. 1a.) Respondents filed a timely petition for rehearing, which the Ninth Circuit denied on June 9, 1998. (App. 1c.) This Petition is being filed within 90 days of the date of that denial order. The jurisdiction

of this Court is invoked under 28 U.S.C. § 1254(1). The district court, the court of first instance, had jurisdiction pursuant to 28 U.S.C. § 1331 federal question jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> **Seizures, Searches and Warrants**
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In pertinent part, 42 U.S.C. § 1983 (1994) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

A. Factual Background.

On January 1, 1996, Irvine Police Officer Troy Gielish stopped Plaintiff Mauricio Fernandez on suspicion of drunk driving and asked him to complete a preliminary test to help determine Fernandez's level of intoxication. Fernandez asked what his options were, and Officer Gielish responded "blood, urine or breath test." Fernandez said he would take whichever breath test he was required to take. Fernandez flunked the preliminary test, so he was arrested and taken to the police station. Officer Gielish then told Fernandez that a technician would obtain a blood sample from him. Fernandez did not verbally or physically resist the taking of the blood. However, Fernandez alleges that had he been allowed to exercise his choice he would have selected a breath or urine test.

Jeffrey Capler, listed in the Complaint as a potential class member, was arrested on November 30, 1994 on suspicion of drunk driving. Capler initially agreed to a blood test, but changed his mind and informed the arresting officer he wanted a breath test. Although a breath test machine was available, and the blood test had not yet been taken, the officer told Capler that he could not change his mind and must submit to a blood test. Neither Capler nor Fernandez allege that excessive force was used during the taking of the blood or that the samples were not taken in a medically approved manner.

B. Procedural History.

Plaintiffs' motion for class certification was pending when the district court dismissed this suit by granting Defendants' Motion for Judgment on the Pleadings. (App. at 2a.) The Ninth Circuit affirmed the district court ruling except with respect to Plaintiff Fernandez and Capler, a potential class member included in the Complaint. The Ninth Circuit held that once Capler and Fernandez selected a breath test, the officers' refusal to honor that request and insistence on taking a blood sample was "unnecessary and unreasonable" and a violation of the Fourth Amendment. (App. at 18a.) The Ninth Circuit stated:

> [T]he City of Irvine's insistence upon obtaining blood samples from Mauricio Fernandez, Jeffrey Capler, and other class members who requested or consented to undergo breath tests instead of blood tests was unreasonable if breath tests were actually available.

(App. at 14a.)

The court held that once a drunk driving suspect indicates a preference for a breath or urine test, the officer cannot take a blood test from the suspect. If a suspect indicates a testing preference, the officer must follow that preference regardless of the potential loss of evidence, the difficulty in administering that test, or the time and money necessary to locate, set up, and complete the test.

> Whenever a DUI arrestee consents to a breath or urine test, and such tests are available, the administration of either the breath or urine test

> would preserve the evidence and end the exigency. In such cases . . . the blood tests were not only unnecessary and unreasonable, but violated the Fourth Amendment's warrant requirement.

(App. at 18a (footnote omitted).) The court also ruled that Capler and Fernandez had stated claims for assault and battery.

As a result of the Ninth Circuit decision, one of the original plaintiffs, and one of the original six potential class members, remain in the case. The Ninth Circuit remanded the case to the district court for further proceedings. Before the mandate could issue, the Ninth Circuit granted Defendants' request for a stay pending the outcome of this Petition.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue because the Ninth Circuit's opinion effectively nullifies the implied consent statutes of Arizona, Montana, and Idaho, and calls into question the constitutionality of implied consent statutes of some 13 other states outside the Ninth Circuit. The opinion sweeps away California's implied consent law as interpreted by the California Supreme Court and conflicts with the decisions of numerous state supreme courts both within and outside of the Ninth Circuit. *The Ninth Circuit is the only circuit which gives a drunk driver control over producing the evidence necessary to convict him.*

The Ninth Circuit's opinion also gives this Court the opportunity to address an important issue left open 32

years ago in *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, this Court held that taking a non-consensual blood sample from a drunk driving arrestee who refused to submit to any chemical testing did not violate the Fourth Amendment to the Constitution if the police had probable cause to arrest and if the sample was taken in a medically approved manner. *Id.* at 770-772. However, this Court in *Schmerber* expressly declined to address the issue of whether the blood test would have been inappropriate had *Schmerber* first requested a breath or urine test. *Id.* at 771.

Perhaps most importantly, the Ninth Circuit's opinion creates very real problems for law enforcement officers both within and outside of the Ninth Circuit. The decision places an often uncooperative and inebriated person in charge of producing key evidence linking that person to a crime. Officers in states such as Arizona and Montana now have no choice but to follow the Ninth Circuit opinion, even though their state legislators and their state implied consent statutes instruct them to take charge of the investigation and select the appropriate chemical test. Complying with the Ninth Circuit opinion may result in a time consuming and costly evidence gathering process that may ultimately be too expensive to pursue on a long term basis. But opting to follow their state's own implied consent statutes will almost certainly result in civil liability based on the Ninth Circuit's opinion.

By forcing law enforcement officers to ignore their state's own implied consent statutes, the Ninth Circuit's opinion significantly undercuts law enforcement's ability to fight drunk driving, a national calamity that costs thousands of lives each year. This Court's intervention is necessary to reverse this setback in the war against drunk driving.

I.

THE NINTH CIRCUIT'S OPINION CONFLICTS WITH NUMEROUS STATE STATUTES AND COURTS OF LAST RESORT THROUGHOUT THE NINTH CIRCUIT AND THE UNITED STATES

A. The Ninth Circuit Opinion Nullifies The Implied Consent Statutes Of Arizona, Montana, And Idaho.

The Ninth Circuit's decision effectively nullifies the implied consent statutes of Arizona, Montana, and Idaho. The Arizona implied consent law states if a law enforcement officer has probable cause to believe that a person is operating a motor vehicle under the influence of alcohol, that individual must submit to a blood, breath or urine sample in order to determine his or her blood alcohol. *See* Ariz. Rev. Stat. § 28-691(A) (1997). The statute states, "The test or tests *chosen by the law enforcement agency* shall be administrated at the direction of the law enforcement officer. . . . " *Id.* (emphasis added).

This statute is now unconstitutional to the extent the suspect declines to take the test chosen by the law enforcement agency. Under the law as enunciated by the Ninth Circuit, the law enforcement agency must now administer the test the *suspect* chooses. Arizona's implied consent law is no longer enforceable.

Montana's enforcement of its drunk driving laws is similarly impacted. *See* Mont. Code Ann. § 61-8-402 (1997). Under Montana law, anyone in control of a vehicle is deemed to have given consent to a blood *and* breath

test for alcohol or drugs. *Id.* at § 61-8-402(1). The officer decides which test to administer. "The arresting or investigating officer may designate which test or tests are administered." *Id.* at § 61-8-402(b).

The Idaho statute is similar. *See* Idaho Code § 18-8002 (1997). It also authorizes law enforcement officers to request the arrestee to submit to the officer's choice of a blood, breath or urine test. *State v. Griffiths*, 113 Idaho 364, 370, 744 P.2d 92, 98 (1987) (construing Idaho Code § 18-8004(1)).[1]

The legislatures of Arizona, Idaho, and Montana enacted drunk driving laws giving law enforcement the ability to select whichever chemical test the agency deemed appropriate. The Ninth Circuit decision expressly takes away that ability. These states enacted the statutes to fight the ravaging effects of drunk drivers who, as the Ninth Circuit recognizes, kill or maim hundreds of thousands of people every year. *Hammer v. Gross*, 932 F.2d 842, 852 (9th Cir. 1991) (Kozinski, J., concurring). The Ninth Circuit's interference will result in an increase

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[1] Similarly worded statutes giving the law enforcement agency the right to select the test it deems appropriate are common throughout the United States. *See, e.g.*, Ohio Rev. Code Ann. § 4511.191 (Anderson 1997); La. Rev. Stat. Ann. § 32:661 (West 1989 & Supp. 1998); Del. Code Ann. tit. 21, § 2741 (1997); Utah Code Ann. § 41-6-44.10 (1993 & Supp. 1997); Iowa Code § 321J.6 (1997); Kan. Stat. Ann. § 8-1001 (1992 & Supp. 1997); N.D. Cent. Code § 39-20-01 (1997); N.M. Stat. Ann. § 66-8-107 (Michie 1998); Conn. Gen. Stat. Ann. § 14-227b (West 1987 & Supp. 1998); Ind. Code Ann. § 9-30-6-2 (Michie 1997); Wyo. Stat. Ann. § 31-6-102 (Michie 1994 & Supp. 1996); Tex. Transp. Code Ann. § 724.012 (West 1998); N.Y. Veh. & Traf. Law § 1194 (McKinney 1996 & Supp. 1998); D.C. Code Ann. § 40-502 (1998).

in these tragic statistics. By effectively declaring these statutes unconstitutional, the Ninth Circuit undercuts those states' ability to fight drunk driving. The Ninth Circuit's decision puts law enforcement officers in the awkward position of having to choose between following their state's implied consent statutes or controlling federal court precedent.

B. The Ninth Circuit Opinion Conflicts With State Supreme Court Decisions.

The Ninth Circuit's decision conflicts with decisions of the California Supreme Court and state supreme court decisions from within and outside of the Ninth Circuit.

Before and after California implemented its implied consent statute, the California Supreme Court affirmed the law enforcement officer's ability to take non-consensual blood samples from drunk driving suspects under certain circumstances. California's implied consent law, enacted in 1992, gives the drunk driving suspect the choice of submitting to a blood, breath, or urine test. Cal. Veh. Code § 23157 (West Supp. 1998). However, in *Mercer v. Department of Motor Vehicles*, 53 Cal. 3d 753, 809 P.2d 404, 280 Cal. Rptr. 745 (1991), the California Supreme Court held that law enforcement officers retain the right to take a non-consensual blood sample from the suspect under certain circumstances:

> In other words, *regardless of whether the terms of the implied consent statute are met*, forcible, warrantless chemical testing may occur under the authority of *Schmerber* if the circumstances require prompt testing, the arresting officer has

> reasonable cause to believe the arrestee is intoxicated, and the test is conducted in a medically approved manner incident to a lawful arrest.

Id. at 760, 809 P.2d at 407-08, 280 Cal. Rptr. at 748-49.

As the California Supreme Court explained, this holding was not novel, but "reaffirmed" the ruling in *People v. Superior Court (Hawkins)*, 6 Cal. 3d 757, 761-65, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972). *Hawkins* authorized the non-consensual taking of blood "as long as (i) the testing is incident to a lawful arrest, (ii) the circumstances require prompt testing, (iii) the arresting officer has reasonable cause to believe the arrestee is intoxicated, and (iv) the test is conducted in a medically approved manner." *Mercer*, 53 Cal. 3d at 757, 809 P.2d at 405, 280 Cal. Rptr. at 746. (citations omitted). Law enforcement met all of these conditions during the arrests of Capler and Fernandez, yet the Ninth Circuit's opinion makes the taking of their non-consensual blood samples a violation of their constitutional rights.

Other state supreme courts from within the Ninth Circuit have unhesitatingly given law enforcement officers the right to select the chemical test administered. In *Griffiths*, the Idaho Supreme Court ruled:

> The choice as to the test which will be given is the police officer's . . . . [T]he choice as to which type of evidentiary test for concentration of alcohol, drugs or other intoxicating substances will be requested rests with the police officer, *not the defendant*.

Griffiths, 113 Idaho at 370, 744 P.2d at 98 (emphasis added).

The supreme courts of Montana and Arizona also affirmed the law enforcement officer's right to select the chemical test or tests administered to the drunk driving suspect. *See State v. Christopherson*, 217 Mont. 449, 705 P.2d 121 (1985); *State ex rel. Dean v. City Court of City of Tucson*, 163 Ariz. 510, 789 P.2d 180 (1990).

State courts from outside the Ninth Circuit have also upheld the right of law enforcement officers to choose which chemical test to administer to drunk drivers. In *Bartleme v. Commonwealth Dept. of Transp.*, 563 A.2d 543 (Pa. Commw. Ct. 1988), a drunk driving suspect alleged the police department's policy of requiring a blood test for *all* drunk driving arrests was unconstitutional. The court, rejecting the argument, held that once the officer has reasonable grounds for believing the plaintiff was driving under the influence, the police officer had "unfettered discretion" to require the plaintiff to submit to a blood test. *Id.* at 252. The court concluded that "[h]aving found no constitutional violation, we affirm the trial court's order." *Id. See also State v. Butler*, 667 A.2d 108, 110 (Me. 1995) (upholding officer's insistence that arrestee submit to breath test even though arrestee wanted blood test).

The Kentucky Supreme Court reached the same result in *Beach v. Commonwealth*, 927 S.W.2d 826 (Ky. 1996). There, a drunk driving suspect challenged the constitutionality of a peace officer's decision to require her to submit to a blood test without the option of a breath test. Plaintiff argued that the officer should not have "unfettered discretion" to determine which test she must take. *Id.* at 827. The Kentucky Supreme Court, rejecting her argument, re-affirmed the Kentucky implied consent law

giving the officer the authority to determine which test to administer. *Id.* at 828.

These authorities are not exhaustive. They are indicative of the importance state legislatures and state supreme courts place on permitting the law enforcement agency to select the chemical testing option it deems appropriate for the circumstances.

II.

THE NINTH CIRCUIT OPINION PRESENTS A SUBSTANTIAL QUESTION OF FIRST IMPRESSION LEFT OPEN BY *SCHMERBER* 32 YEARS AGO.

Thirty-two years ago, the Supreme Court addressed the constitutionality of taking a non-consensual blood sample from a drunk driving arrestee in *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, plaintiff refused to consent to either a blood or breathalyzer test after he was arrested for suspicion of drunk driving. *Id.* at 765. The police, without physical resistance, withdrew a blood sample from the arrestee anyway. *Id.* at 758-59. The arrestee moved to suppress the results of the blood test in the criminal proceeding on the grounds that the taking of the blood sample was an unreasonable search and seizure in violation of his Fourth Amendment rights.

The Supreme Court held that while the withdrawal of blood from a drunk driving arrestee constituted a "search" within the meaning of the Fourth Amendment, the search was not unreasonable because (1) the police had probable cause to believe the arrestee was driving under the influence, and (2) the blood was withdrawn in a medically acceptable manner. *Id.* at 770-72. The

Supreme Court, however, declined to address whether a blood test would be reasonable if the police were faced with a reasonable request by the arrestee for a different form of testing:

> Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused . . . . We need not decide whether such wishes would have to be respected.

Id. at 771.

Thus, *Schmerber* was limited to the issue of law enforcement's ability to require a drunk driver to submit to a non-consensual blood test when that driver refuses to submit to *any* test. *Schmerber* left open the issue of whether a drunk driver can be required to take a blood test even if he is willing to take another test. The Ninth Circuit in this case concluded *"This appears to be an issue of first impression . . . . "* (App. 9a (emphasis added).)

Until now, neither the Supreme Court nor any other federal circuit has had occasion to address the issue left open in *Schmerber*. Rather, state courts were left to deal with the issue and, more often then not, resolved it in favor of permitting law enforcement to gather the evidence in a manner the officer deemed appropriate. *See, e.g., Griffiths*, 113 Idaho at 370, 744 P.2d at 98 ("The choice as to the test which will be given is the police officer's."); *Christopherson*, 217 Mont. at 451, 705 P.2d at 123; *Bartleme*, 563 A.2d at 544-45 (no constitutional violation with policy requiring blood tests of every drunk driving arrestee).

The Ninth Circuit has ruled contrary to all of the above state court decisions by holding that a drunk driver has a Fourth Amendment right to the chemical test of the driver's choice. This case gives the Supreme Court the opportunity, after 32 years, to address the issue *Schmerber* left open.

III.

THE NINTH CIRCUIT OPINION UNNECESSARILY IMPAIRS LAW ENFORCEMENT'S ABILITY TO COMBAT DRUNK DRIVING.

By giving the suspect control over production of critical evidence, the Ninth Circuit's decision impairs the ability of law enforcement agencies to combat drunk driving. Common sense dictates that the law enforcement officer, not the suspect, should decide which test to administer. The suspect does not want to produce the evidence that could lead to his or her drunk driving conviction. Hence, the suspect's sole motivation is to delay production of the evidence as long as possible. This Ninth Circuit ruling gives a suspect the ability to do just that.

Permitting the suspect to retain control over producing evidence necessary for a conviction is troubling because alcohol in the blood dissipates over time. The experienced drunk driver knows the longer he or she can delay producing evidence, the more likely the blood alcohol level – and the chance of conviction – will decrease. This Court has recognized this problem. *See Schmerber*, 384 U.S. at 770-71. By giving the suspect the right to choose the test, the Ninth Circuit's opinion makes delay

much easier. For example, the savvy drunk driver can pick the most time-consuming and inconvenient test[2], or repeatedly change his or her mind, thereby forcing the officer to set up a different test at yet another different location.

Getting critical evidence from an inebriated and often uncooperative individual is a challenging task under the best of circumstances. By putting control over the evidence gathering process into the hands of an angry drunk, the Ninth Circuit ruling has seriously inhibited the ability of law enforcement agencies to gather the evidence necessary to effectively wage the war against drunk driving.

Placing a drunk driver in control of producing the evidence rewards the cynical and shrewd while punishing everyone else. The Ninth Circuit rejected a "Miranda" warning informing the suspect of the various tests available. (App. at 13a.) Thus, the repeat offender, the one society most desperately needs to take off the road, will be the one most familiar with his testing options and know best how to manipulate the system to avert conviction. As a practical matter this rule will lead to fewer convictions and provide a severe setback in the effort to prevent drunk driving.

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[2] The suspect can create delay by requiring the officer to drive to a distant hospital for a blood test, or to a distant police station where the breathalyzer is located. The suspect can create delay by demanding a blood test when the officer certified to administer the test is an hour away, and then later insist on a urine test where the testing kit is a considerable distance from the arrest site.

Many other sound reasons support giving law enforcement the choice of tests. First and foremost, each law enforcement agency should be able to provide the test that best meets its financial and personnel limitations. An agency may prefer a blood test because it is located near a hospital, providing easy and relatively inexpensive access to a blood test. A more rural agency might not be able to afford the expense involved with having a blood technician on call 24 hours a day and thus prefer a breath or urine test. These issues, while ignored by the Ninth Circuit, have been considered by courts throughout the country.

The Idaho Supreme Court ruled that the it is important that the arresting agency choose which test, and *not the drunk driving suspect,* in order to minimize the cost to the agency. *See Griffiths,* 113 Idaho at 370, 744 P.2d at 99. "A contrary holding would require the many rural law enforcement agencies of this state to have readily available all three evidentiary tests, and this would be a burdensome requirement." *Id.*

Other jurisdictions in the Ninth Circuit may not be able to afford to maintain all three forms of alcohol testing. The Ninth Circuit's decision in essence gives these jurisdictions the Hobson's choice of either spending precious public resources on expensive equipment or ceasing to enforce drunk driving laws.

Cost is not the only concern. Some courts have questioned the accuracy of certain types of chemical tests. The Nebraska Supreme Court undercut the use of breath tests after it found that breath tests were not as accurate as blood tests. *See State v. Burling,* 224 Neb. 725, 400 N.W.2d

872 (1987). The flaw with certain breath tests is that they only measure alcohol content in *breath* while most state statutes require evidence concerning the alcohol content of the *blood*. When the breath test results are extrapolated to get a blood alcohol level, variations in the testing equipment and procedures can render the final result inaccurate. *Id.* at 729-30. Given the uncertainty of breath tests in some jurisdictions, certain agencies may choose to deemphasize the taking of breath tests. Under the Ninth Circuit's opinion, these agencies might not have that choice.

IV.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted in all respects.

Respectfully submitted this 22nd day of July, 1998,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCOTT NELSON; MAURICIO BAEZ FERNANDEZ, on behalf of themselves and on behalf of others similarly situated, *Plaintiffs-Appellants,* v. CITY OF IRVINE, CHIEF OF POLICE CHARLES S. BROBECK, OFFICER TROY GIELESH, OFFICER SHIRLEY SUMNER, OFFICER ROBERT LANDMAN, CALIFORNIA FORENSIC PHLEBOTOMY, INC. *Defendants-Appellees.*	No. 96-56813 D.C. No. CV-96-00199-GLT OPINION

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted
March 6, 1998 – Pasadena, California

Filed May 6, 1998

Before: Robert Boochever and Andrew J. Kleinfeld, Circuit Judges, and Jack E. Tanner, District Judge.*

* Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

COUNSEL

Jeffrey Wilens, Irvine, California, Barry T. Simons, Laguna Beach, CA, for plaintiffs/appellants.

Jeffrey Wertheimer, Rutan & Tucker, LLP, Costa Mesa, CA, for the defendants/appellees.

BOOCHEVER, Circuit Judge:

David Nelson and Mauricio Fernandez, on behalf of themselves and others similarly situated (hereafter collectively "Nelson"), appeal from the district court's judgment on the pleadings in their 42 U.S.C. § 1983 action against the City of Irvine, its chief of police, and several individual officers (hereafter collectively "City of Irvine"), alleging that following their arrests for driving under the influence of alcohol they were coerced into submitting to blood tests in order to determine their blood alcohol level, and deprived of the statutorily mandated option to take a breath or urine test instead.

I. Facts and Procedural History

The plaintiffs' motion for class certification was pending when the district court dismissed this suit on the pleadings. The claims of the proposed class representatives are described in the first amended complaint, and for purposes of this appeal we accept those allegations as

true. *McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1460 (1997).

Irvine Police Department officer Troy Gielish arrested David Nelson on suspicion of driving under the influence of alcohol ("DUI"). En route to the police station, Officer Gielish radioed ahead for a blood technician, and asked Nelson if he "had a problem" with taking a blood test. Nelson was not advised that he had a choice of a blood, urine, or breath test and, as he interpreted the officer's question as rhetorical, he felt he had no choice in the matter. Nelson submitted to the blood test without offering any verbal or physical resistance, but had he been given a choice, he now alleges he would have selected a breath or urine test.

Officer Gielish stopped Mauricio Fernandez on suspicion of DUI and asked him to blow into a Preliminary Alcohol Screening Device to determine whether or not he was intoxicated. Officer Gielish advised Fernandez that the results of the preliminary breath test would not be admissible in court regardless of the outcome. Fernandez asked Officer Gielish to list his options. Officer Gielish told him, "a blood, urine, or breath test." Fernandez replied he would take whatever breath test he had to. Fernandez flunked the preliminary breath test, so Officer Gielish arrested him and took him to the station. The officer told Fernandez that a technician was "going to get a blood sample." Fernandez did not verbally or physically resist the taking of the sample. Fernandez alleges that, had he been allowed to exercise his free choice, he would have selected a breath or urine test.

The claims of other plaintiffs provide variations on the same theme. David Tyler was not informed by arresting Irvine P.D. officers that he had a choice of tests, and was told that if he did not cooperate in the taking of a blood test he would be held in jail over the weekend. Vicki Caruso was not informed by Irvine P.D. officers that she had a choice of blood-alcohol tests, and was told she had to submit to a blood test. Jeffrey Capler initially agreed to take a blood test but then changed his mind and informed the arresting officer that he wanted to take a breath test. Although a breath test machine was available, and the blood sample had not yet been taken, the officer told Capler that he could not change his mind and must submit to a blood test. Kristi Giordano was initially permitted to take a breath test, but the officer stopped her in the middle, told her she was doing it wrong, and required her to take a blood test instead. A blood sample was taken against her will. Jeffrey Chancellor was told that if he submitted to a blood test he would be released in four hours, but if he selected a urine test he would not be released for at least 17 hours. He was not offered a breath test. He submitted to a blood test.

Richard Heil was arrested for DUI, transported to the station, and told he had to provide a blood sample. He claims he was not advised of his choice of tests, but instead was told that if he did not provide a blood sample voluntarily, he would be strapped to a chair so that a sample could be forcibly taken. Heil was told that if he resisted and the officer had to call for assistance, he would be jailed for 48 hours. Heil submitted to a blood test. He claims that had he been offered a choice, he would have selected a breath or urine test.

There is nothing in the first amended complaint to suggest that Irvine P.D. officers obtained warrants before administering the blood tests in any of the cases described.

This court reviews de novo Rule 12(c) judgments on the pleadings. *McGann*, 102 F.3d at 392. A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law. *Id.*

II. Constitutional Claims

A. Fourth & Fourteenth Amendments

To pass constitutional muster under the Fourth Amendment a search must be reasonable. *Ohio v. Robinette*, 117 S.Ct. 417, 421 (1996). Generally, a search must also be supported by probable cause, and must be backed up by a warrant, or the circumstances must fit an exception to the warrant requirement. *Winston v. Lee*, 470 U.S. 753, 759-61 (1985). It is undisputed that the police had probable cause for the searches in question. At issue, then, is whether the blood tests were reasonable, and whether "exigent circumstances" or some other exception to the warrant requirement existed to excuse the police from obtaining warrants. We address each of these two distinct inquiries in turn.

1. *Reasonableness*

In *Schmerber v. California*, 384 U.S. 757 (1966), the Supreme Court held that blood extraction from an arrestee who had refused a breath test is reasonable.

However, the Court expressly reserved the question whether the government could take blood when other tests were available or requested:

> Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "Breathalyzer" test petitioner refused. . . . We need not decide whether such wishes would have to be respected.

Id. at 771. The Court also emphasized that its holding "in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other conditions." *Id.* at 772. Thus, *Schmerber* did not reach the issue whether it violates the Fourth Amendment's reasonableness command to require an arrestee, who has expressed a preference for, or consented to, an available breath or urine test, to submit to a blood test.

In *Winston v. Lee,* the Supreme Court held that it violated the Fourth Amendment forcibly to remove from the chest of a robbery suspect a bullet having evidentiary value. The Court clarified and applied the *Schmerber* balancing test as "the appropriate framework of analysis," noting that "the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers." 470 U.S. at 760.

Assuming the threshold requirements of probable cause and a warrant or an exception to that requirement have been met, the next step in the *Schmerber* inquiry is to "consider a number of other factors in determining the 'reasonableness' of the blood test." *Id.* at 761. The Court noted that a "crucial factor in analyzing the magnitude of

the intrusion in *Schmerber* is the extent to which the procedure may threaten the safety or health of the individual." *Id.* When assigning weight to this factor in the case of a blood test, the Court found it significant that the test did not "endanger[ ] the life or health of the suspect," " 'involves virtually no risk, trauma, or pain,' " and "was performed 'by a physician in a hospital environment according to accepted medical practices.' " *Id.* (quoting *Schmerber*, 384 U.S. at 771). "Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." *Id.* at 761.

"The integrity of an individual's person is a cherished value in our society." *Schmerber*, 384 U.S. at 772. Nevertheless, "Schmerber recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Winston*, 470 U.S. at 762. The factors determining the intrusiveness of the blood test in this case are largely indistinguishable from those in *Schmerber*, although medical science now teaches that special precautions should be employed in procedures involving exposure to bodily fluids.[1]

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[1] *See, e.g.*, Centers for Disease Control, U.S. Dep't of Health and Human Services, *Guidelines for Prevention of Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Health-Care and Public-Safety Workers*, 17-18 (1989) ("Blood from *all* individuals should be considered infective," and the "[u]se of needles and syringes should be limited to situations in which there is no alternative"); Centers for Disease Control and Prevention, U.S. Dep't of Health & Human Services, *Update: Provisional Public Health Service Recommendations for Chemoprophylaxis After Occupational Exposure to HIV*, 276 JAMA 90 (1996) ("preventing blood exposures is the primary means of

To be "[w]eighed against these individual interests is the community's interest in fairly and accurately determining guilt or innocence." *Id.* A blood test is "a highly effective means of determining the degree to which a person is under the influence of alcohol." *Schmerber,* 384 U.S. at 771. The *Winston* Court found that

> Especially given the difficulty of proving drunkenness by other means, these considerations showed that results of the blood test were of vital importance if the State were to enforce its drunk driving laws. In *Schmerber,* we concluded that this state interest was sufficient to justify the intrusion, and the compelled blood test was thus "reasonable" for Fourth Amendment purposes.

Winston, 470 U.S. at 763. Thus, in weighing society's interest, the Court considered important the effectiveness of the blood test and the unavailability of other means of obtaining the same evidence.

California law provides that the amount of alcohol in a person's blood may be shown by chemical analysis of that person's blood, breath, or urine, Cal. Veh. Code § 23155(a), and criminalizes "driving either with the specified blood-alcohol level or with the specified breath-alcohol level." *People v. Bransford,* 8 Cal. 4th 885, 890 (1994). Thus, in California, breath and urine tests are

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preventing occupationally acquired human immunodeficiency virus (HIV) infection"); Ronald L. Nichols, *Percutaneous Injuries During Operation: Who is at Risk For What?,* 267 JAMA 2938 (1992) ("[N]eedle-stick and other sharp injuries . . . account for greater than 80% of occupationally acquired cases of HIV infection in [health care workers]").

equally effective as a blood test in determining whether a suspect has violated the DUI law. *People v. Fiscalini*, 279 Cal. Rptr. 682, 686 (Ct. App. 1991). Further, California law requires that breath and urine tests be available: a DUI arrestee "has the choice of whether the test shall be of his or her blood, breath, or urine, and the officer shall advise the person that he or she has that choice." Cal. Veh. Code § 23157 (West 1997).

When a DUI arrestee consents to undergo a breath or urine test, the government has available to it an effective alternative to a blood test as a means of obtaining the same evidence. We must decide whether, under such circumstances, forcing the arrestee to undergo a blood test is unreasonable.

This appears to be an issue of first impression, although this court considered a closely related issue on similar facts in *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991) (en banc). Hammer involved a blood test taken by physical force by Newport Beach Police from a DUI suspect who had agreed, just before administration of that test, to take a breath test instead.

Timothy Hammer was arrested on suspicion of DUI, and handcuffed after he failed a series of field sobriety tests. At the hospital, Hammer was told he would be required to take one of three chemical tests (blood, breath or urine), but he refused to take any test. The officer handcuffed Hammer to a chair and asked whether Hammer would take a blood test; Hammer again refused. A lab technician made her first attempt to take a blood sample. Hammer jumped and tried to wrestle away, overturning his chair. The officer told Hammer he was going

to take blood "the easy way or the hard way." *Id.* at 844. Hammer said he would consent to a breath test "if that's what it's going to come to." *Id.* The officer insisted on a blood sample, which the technician took while the officer held Hammer down in the chair. *Id.*

Hammer brought a § 1983 suit alleging police violated the Fourth Amendment by unreasonably employing excessive force when taking the blood sample. A jury returned a verdict in Hammer's favor and awarded damages. A three-judge panel of the Ninth Circuit reversed, finding the police officer's conduct in restraining the suspect during the blood test was not unreasonable. *Hammer v. Gross,* 884 F.2d 1200 (9th Cir. 1989).

The en banc panel rehearing the case issued a split decision. The central issue in *Hammer* was whether a rational jury could have concluded that the amount of force used by the officers to obtain the blood sample was unreasonable under the circumstances. *Hammer,* 932 F.2d at 845. As *Hammer* makes clear, the inquiry into the reasonableness of use of force to obtain a blood sample requires, inter alia, an evaluation of the "degree of the authorities' need for the blood sample." *Id.* at 846 (plurality opinion).

The plurality opinion describes factors that should be analyzed to determine whether the force used to extract a blood sample was unreasonable, including severity of the crime, whether the suspect actively resisted, and whether he posed an immediate threat to the officers or others. "It is also appropriate to consider whether the police 'refused to respect a reasonable request to undergo a different form of testing.' " *Id.* (quoting *Schmerber,* 384

U.S. at 760 n.4 which significantly noted that it "would be a different case" if the police had refused to respect such a request). Applying that factor, the opinion reasoned: "Moreover, after some force had been applied but before the blood was actually extracted, Hammer had agreed to submit to a breathalyzer test. Consent to a breathalyzer test may very well have reduced to insignificance the defendants' need to extract Hammer's blood." *Hammer*, 923 F.2d at 846. Although the defendants claimed Hammer's belated consent was merely a ploy, "[t]he jury could have concluded that the consent was genuine, rendering further use of force unreasonable." *Id.*

In concurring, Judge Kozinski wrote: "For me, this case turns on a single fact: Hammer agreed to submit to an alternative alcohol test to avoid having blood drawn from his vein, but he was nonetheless subjected to the forcible extraction of his blood." *Id.* at 851 (Kozinski, J., concurring). This, according to Judge Kozinski, was unreasonable:

> If an alternative test is readily available and a suspect requests it, police officers may not arbitrarily refuse to administer it simply because the suspect did not have the presence of mind to make a decision more promptly or because he changed his mind. The standard, as always under the fourth amendment, is reasonableness. Defendants have offered no explanation for [the officer's] refusal to comply with Hammer's request. Based on the evidence, the jury could conclude that [the officer's] refusal to administer an alternative test was unreasonable.
>
> . . . .

> The government's need for the blood is, of course, critical: It would be senseless, cruel and unreasonable for the government to draw blood without needing it. Yet, that's what the jury could have found happened here: Because Hammer consented to a breath test, the government had no need for the blood but nonetheless obtained it forcibly.

Id. at 852. Judge Kozinski argued that under the circumstances of the case, none of the other factors listed in the plurality opinion mattered:

> No matter how serious the offense, the availability of an equally effective, consensual method of obtaining the evidence conclusively renders use of the nonconsensual method unreasonable. If the suspect requests a breath or urine test and it will do the job just as well, it must be used in lieu of a blood test – even where the suspected crime is murder in the first degree.[2]

Id.

Thus, a majority of the en banc panel indicated that if an alternative test is readily available, and the suspect requests it, a rational jury could conclude that it is unreasonable and in violation of the Fourth Amendment for police officers to insist on a blood test.

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[2] Judge Kozinski resolved the other two factors as follows: 1) "[W]hether the suspect resists is certainly relevant in determining how much force the police may use" but "because the police had no need for the blood, they weren't entitled to use any force to obtain it." *Id.* 2) "The remaining factor – whether the individual is a threat to the officers – has no bearing at all here. . . . I just can't imagine a case where the police need to administer a blood test in self-defense." *Id.*

The *Hammer* dissent relied upon California cases that have held that police are not required to give an arrestee a second opportunity to comply with the statutory requirement that they take a blood-alcohol test after their initial refusal, and that "California courts have repeatedly indicated that section 13353 does not alter the analysis of fourth amendment claims." *Id.* at 854- 55 (Fernandez, J., dissenting). As such, "the outcome of [the] case is controlled entirely by *Schmerber* and its progeny." *Id.* at 855.

In the case at bar, the City makes a similar argument, and the district court agreed that "the implied consent law does not create any constitutional rights to have performed, or even be informed of, any of the three testing options." While failure to advise DUI arrestees of their choice of tests appears to violate the California implied consent statute, such a failure does not violate the Fourth Amendment's reasonableness requirement. The Supreme Court has not announced a *Miranda*-type requirement that suspects be advised of their Fourth Amendment rights. *See Ohio v. Robinette,* 117 S.Ct. 417 (1996) (Fourth Amendment does not require a lawful detainee be advised that he is "free to go" before his consent to a search will be recognized as voluntary); *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973) (the Fourth Amendment does not require knowledge of a right to refuse to consent to a search, nor must police advise the subject of the search of his right to refuse consent). Thus, the Fourth Amendment is not violated by the City of Irvine's failure to advise class members, who did not request or consent to a urine or breath test, of their right

to choose among the alternative tests.[3] However, the City of Irvine's insistence upon obtaining blood samples from Mauricio Fernandez, Jeffrey Capler, and other class members who requested or consented to undergo breath tests instead of blood tests was unreasonable if breath tests were actually available.

The City of Irvine mistakenly relies upon *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989), arguing that if it does not violate the Fourth Amendment to require railroad employees involved in train accidents to submit to suspicionless, duplicative tests, *i.e.*, both blood and urine tests, it cannot violate the Fourth Amendment to deny DUI arrestees the choice of one test over another.

The City of Irvine's reliance upon *Skinner* is misplaced because the Court distinguished the drug testing of railroad employees from other searches conducted by law enforcement officers:

> We have recognized exceptions to this rule, however, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.

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[3] The class representatives who have not alleged they requested or consented to a breath or urine test include David Nelson, David Tyler, Vicki Caruso, Kristi Giordano, Jeffrey Chancellor, Richard Heil.

Id. at 619 (citations omitted). The Court cited as examples of "special needs," searches of probationers' homes, searches of the premises of highly regulated businesses, work-related searches of employees' desks and offices, searches of students' property by school officials, and body cavity searches of prison inmates. *Id.* at 619-20. It is untenable to equate the police DUI traffic stops with the pervasively regulated environments where special needs can justify even suspicionless drug testing.

In *Skinner,* the Court reviewed a testing scheme that included breath, blood and urine tests, and had the occasion to discuss each testing method individually and judge the relative invasiveness of each. That general discussion of the tests is useful here. The Court reiterated its assessment in *Schmerber* that blood tests are commonplace, and " 'society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity.' " *Id.* at 625 (quoting *Winston,* 470 U.S. at 762). However, the Court found breath tests to be less invasive:

> The breath tests authorized by . . . the regulations are even less intrusive than the blood tests. . . . Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more. . . . [B]reath tests reveal no other facts in which the employee has a substantial privacy interest.

Id. at 625-26. Urine tests, on the other hand, the Court adjudged "a more difficult question" because the procedures "require employees to perform an excretory function traditionally shielded by great privacy, [and] raise concerns not implicated by blood or breath tests." *Id.* at 626. This court, however, has recently answered that question by stating that "requiring an arrestee to submit to a urine test is reasonable under the Fourth Amendment." *United States v. Del Edmo*, 1998 WL 162162, *2; ___ F.3d ___ (9th Cir. 1998).

The City of Irvine relies upon *Veronia* [sic] *School Dist. v. Acton*, 515 U.S. 646 (1995), for the Supreme Court's statement that "[w]e have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Id.* at 581. The City reads this declaration to mean that the relative instrusiveness [sic] of the tests is not relevant to the reasonableness inquiry, and claims the "less intrusive alternative" argument was rejected in *Skinner* as well. Although *Skinner* declined to find that the existence of less intrusive alternatives rendered suspicionless testing unreasonable under the Fourth Amendment, the Court did not reject that line of inquiry as improper or irrelevant. Instead, it noted that " 'the reasonableness of any particular government activity does not necessarily or invariably *turn* on the existence of alternative "less intrusive" means.' " *Skinner*, at 629 n.9 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)) (emphasis added). The Court reasoned that "judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished," and that the

"insistence on less drastic alternatives would require [the Court] to second-guess the reasonable conclusions drawn by the [government regulator] after years of investigation and study." *Id.* (quotations omitted).

In the case at bar, we need not speculate as to what less intrusive alternatives might be available. Breath and urine tests are established alternative methods which state statutes both approve as evidence and require the police to offer to DUI arrestees. No second-guessing of the California legislature is required. Further, although the intrusiveness of blood tests is a factor to be considered in the reasonableness inquiry, this case does not turn on the relative intrusiveness of the tests.

2. *Exigent Circumstances*

In *Schmerber,* the Supreme Court carved out an exception to the warrant requirement for blood-alcohol tests. "[T]he percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." 384 U.S. 770. The evanescent nature of the evidence sought, and the risk of its loss during the delay while officers tracked down a magistrate to obtain a warrant, led the court to hold that no warrant was required.[4]

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[4] Alcohol typically dissipates from the human body at a rate between .015% and .018% per hour, and the scientific community agrees that rate will not exceed .022% per hour, observable in severe alcoholics. E. John Wherry, Jr., *Vampire or Dinosaur: A Time to Revisit Schmerber v. California?,* 19 Am. J. Trial Advoc. 503, 516 (1996). Using a process known as

Neither side disputes that it is the rapid dissipation of alcohol from the blood of the arrestee that creates the initial exigency. When an arrestee requests but is denied the choice of an available breath or urine test, the exigency used to justify the warrantless blood test continues only because of the City's failure to perform the requested alternative test. Whenever a DUI arrestee consents to a breath or urine test, and such tests are available, the administration of either the breath or urine test would preserve the evidence and end the exigency.[5] In such cases, because the sole justification advanced to excuse the officers from obtaining a warrant disappeared when the exigency ended, the blood tests were not only unnecessary and unreasonable, but violated the Fourth Amendment's warrant requirement.

B. Fourteenth Amendment Equal Protection Claim

"Unless a classification trammels fundamental personal rights or implicates a suspect classification, to meet constitutional challenge the law in question needs only some rational relation to a legitimate state interest." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990). Nelson

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"retrograde extrapolation," the blood alcohol level of a suspect who was only barely above the California legal limit of .08% when stopped by police can be determined from a test performed 3 1/2 hours later. *Id.* at 517.

[5] We do not know of any exception to the warrant requirement other than exigency that could excuse the officers' failure to obtain warrants, and the City of Irvine has not alleged that another exception applies.

has not alleged that the City of Irvine's policy implicates any fundamental rights or creates any suspect classifications, and instead claims the policy fails the rational basis test because it is arbitrary. "[T]he rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary." *Id.*

Nelson advances two distinct equal protection arguments alleging two different classification schemes. First, Nelson alleges the Equal Protection Clause is violated by the City of Irvine's systematic deprivation of *all* Irvine DUI arrestees' statutory rights to choose which form of alcohol test they will take. Nelson argues that because DUI arrestees stopped by law enforcement agencies elsewhere in the state "(presumably) were treated in compliance with the law," DUI arrestees in Irvine were being arbitrarily singled out and deprived of their rights.

This first theory must fail because none of the defendants through their policies created a classification scheme among those arrested within their jurisdictions. The alleged disparities in treatment across the state resulted from differences between the policies of the City of Irvine and other city, county and state law enforcement agencies.

Alternatively, Nelson argues that City of Irvine police officers required *most*, but not all, DUI suspects to submit to a blood test and their selection process was arbitrary. According to Nelson, City of Irvine police officers intentionally and arbitrarily discriminated against some DUI arrestees.

Nelson's second equal protection claim is tautological. Nelson alleges that the City of Irvine arbitrarily discriminated against a class of persons, whose defining characteristic is their having been arbitrarily required to take a blood test, by arbitrarily requiring them to take a blood test. By such reasoning, an equal protection claim would arise whenever a law was enforced with something less than perfect regularity.

C. Fourteenth Amendment Due Process Claim

Nelson claims that the California implied consent law creates a liberty interest that is entitled to the procedural due process protections of the Fourteenth Amendment, and that the City of Irvine's policy not to give DUI arrestees the statutorily required choice of tests deprived class representatives of their right to due process.

Despite the plaintiffs' failure to raise this claim below, Nelson asks this court to consider it. We must exercise our discretion to decide whether to consider an issue raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."). "Except in the case of jurisdictional questions or where particular circumstances indicate that injustices might otherwise result or where public policy requires, this Court declines to consider arguments for reversal not presented to the district court." *In re U.S. Financial, Inc.*, 594 F.2d 1275, 1282 (9th Cir. 1979).

No jurisdictional question is involved here. Nor has Nelson set forth reasons why public policy requires us to consider this argument which was not presented to the district court. Injustice might result from an appellate court's failure to consider an argument that would affect an appellant's determination of guilt or length of incarceration. Nelson does not contend, however, that if each class member were given his choice of tests he would not have been found to be intoxicated. Nelson therefore points to no injustice that might result from our failure to consider the due process argument raised for the first time on appeal. Accordingly, we decline to consider Nelson's Fourteenth Amendment due process claim.

III. State Law Claims

A. California Civil Code § 52.1

Nelson alleged that City of Irvine police officers, by threats and coercion, interfered with the arrestees' rights secured by the U.S. Constitution and the California implied consent statute, in violation of California Civil Code § 52.1. That section provides in relevant part:

> (a) Whenever a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise of enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General . . . may bring a civil action for injunctive or other appropriate equitable relief. . . .

> (b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute . . . a civil action for damages. . . .

Cal. Civ. Code § 52.1 (West 1997).

The district court dismissed Nelson's claim under California Civil Code § 52.1 because Plaintiffs "fail[ed] to allege Defendants interfered with their legal rights due to Plaintiffs' 'race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute.' " Order at 5 (quoting *Boccato v. City of Hermosa Beach*, 35 Cal. Rptr. 2d 282 (Ct. App. 1994)). In *Boccato*, the California Court of Appeal held that to state a claim under § 52.1, plaintiffs must allege that the interference with the plaintiff's rights by means of threats, intimidation or coercion was "because of" their membership in a protected classification. *Id.* at 290.

The court of appeal that decided *Boccato* acknowledged that the text of § 52.1 does not contain the limitation it imposed, but reasoned that because the statute was enacted to stem the tide of hate crimes, it must be read in conjunction with Cal. Civ. Code § 51.7, a separate provision which establishes the right of all persons to be free of "violence, or intimidation by threat of violence, committed against their persons or property because of their [membership in a protected classification]." *Id.*

Believing *Boccato* to be erroneous, Nelson asks this court to interpret the statute literally, without the restriction to protected classifications imposed by *Boccato*. Because this is a state law issue which has been squarely decided by a state appeals court, we are restricted in our power to do as Nelson urges.

> When interpreting state law, federal courts are bound by decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance. However, where there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts.

In re Bartoni-Corsi Produce, Inc., 130 F.3d 857, 861 (9th Cir. 1997).

The California Supreme Court denied review of *Boccato*, and has discussed § 52.1 in two subsequent decisions, *Jones v. K-Mart Corp.*, 949 P.2d 941 (Cal. 1998), and *In Re M.S.*, 896 P.2d 1365 (1995). Neither of these cases, nor any source Nelson has identified, presents convincing evidence that the California Supreme Court would decide the issue differently from *Boccato*. Because *Boccato* is a decision from California's intermediate appellate court, under these circumstances we are obligated to follow it and affirm the district court's dismissal of Nelson's § 52.1 claim.

B. Assault and Battery

The district court dismissed Nelson's battery claim because "the touching was consensual" as a matter of law under the California implied consent law which provides that any "person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood, breath, or urine." Cal. Veh. Code § 23157(a)(1). Consent is a complete defense to a battery claim. *Ashcroft v. King*, 278 Cal. Rptr. 900, 902 (App. Ct. 1991). However, the next paragraph of the statute provides that a person lawfully arrested for DUI "has the choice of whether the test shall be of his or her blood, breath, or urine, and the officer shall advise the person that he or she has that choice." *Id.* at § 23157(a)(2)(A). The issue, then, is whether § 23157(a)(1) implies consent to any and all tests law enforcement officers choose to employ, or only the test selected by the arrestee.

Sections of statutes should be construed consistently with other statutory sections whenever possible. *See United States v. Bear*, 932 F.2d 1279, 1280-81 (9th Cir. 1991) (as amended). Section 23157(a)(2)(A) permits DUI arrestees a choice of tests, and the California law has been construed to provide that an arrestee is entitled to just one test, *Kessler v. Dept. of Motor Vehicles*, 1 Cal.3d 74 (1969). Thus, only consent to the selected test need be implied under § 23157(a)(1). Because the parties who requested breath tests impliedly consented only to that means of testing, they did not impliedly consent to a blood test and their battery claims are not defeated by virtue of consent to the allegedly harmful or offensive contact.

Conclusion

When an arrestee has agreed to submit to a breath or urine test which is available and of similar evidentiary value, the government's need for a blood test disappears. Under such circumstances, it is unreasonable to require a blood test and the Fourth Amendment is violated. Further, when a DUI suspect agrees to take an available alternative test of equal evidentiary value, the risk that evidence will be lost disappears and the exigent circumstance that excused the police from obtaining a warrant likewise disappears, rendering a warrantless nonconsensual blood test in such circumstances unconstitutional.

Taking the plaintiffs' allegations as true, as we must when reviewing a dismissal under Federal Rule of Civil Procedure 12(c), it was unreasonable to require Mauricio Fernandez to submit to a blood test after he agreed to take "whatever breath test he had to" and to require Jeffrey Capler to submit to a blood test after he requested a breath test. Therefore, concluding that Mauricio Fernandez and Jeffrey Capler failed to allege facts sufficient to make out a constitutional violation and a claim under 42 U.S.C § 1983 was erroneous.

The Supreme Court, however, has "long held that the 'touchstone of the Fourth Amendment is reasonableness,' " *Robinette*, 117 S.Ct. at 421, which "is measured in objective terms by examining the totality of the circumstances." *Id.* Factual development at trial may affect the ultimate determination whether the plaintiffs' requests for alternative forms of testing, which the police refused to respect, were in fact reasonable under the circumstances.

Further, plaintiffs, as a matter of law, stated a valid claim for common law assault and battery. California's implied consent statute, which includes a provision allowing the arrestee a choice of tests, implies consent to the selected test, not whichever test law enforcement officials may choose to employ in violation of the statute.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID SCOTT NELSON et al.,	Case No. SA CV 96-199 GLT (EEx)
Plaintiffs,	ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS
vs.	
CITY OF IRVINE et al.,	
Defendants.	(Filed Oct. 18, 1996)

Defendants' motion for judgment on the pleadings is GRANTED.

Judgment on the pleadings is appropriate when the moving party is entitled to judgment as a matter of law. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). In deciding a Rule 12c motion, the Court must assume the truthfulness of all material facts alleged in the complaint and must construe all inferences reasonably drawn from those facts in favor of the non-moving party. *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989).

A judgment on the pleadings is not proper where the complaint alleges facts which, if proved, would permit recovery. *Wager v. Pro*, 575 F.2d 882, 884 (D.C. Cir. 1976).

I.

FIRST CAUSE OF ACTION – 18 U.S.C. § 1983

Defendants contend Plaintiffs have failed to allege facts which, if proved, rise to the level of a constitutional violation. Plaintiffs, on the other hand, argue their right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments has been violated.

In *Schmerber v. California* the Supreme Court addressed the constitutionality of performing a blood test without consent on a person arrested for drunk driving. 384 U.S. 757 (1966). Provided the test is incident to a lawful arrest and is performed in a medically approved manner, the Court held such a nonconsenting test does not violate the Fourth Amendment. *Id.* at 771. The Court reasoned that when an officer reasonably believes he is confronted with an exigent circumstance, *i.e.*, a change in the arrestee's blood-alcohol level resulting from normal bodily functions, a warrantless blood "search" is constitutional. *Id.; see also People v. Superior Court (Hawkins)*, 6 Cal.3d 757 (1972).

Plaintiffs' claim of a constitutional violation rests on the premise that "the police are not entitled to leap to using the most invasive method of determining blood alcohol when less intrusive methods are equally-available and equally-acceptable." Pltf. Opp. at 2. Because the implied consent law gives drunk driving suspects a choice of tests, Plaintiffs contend the performance of a

blood test without giving the arrestee a meaningful choice is an unconstitutional search.[1]

The California Court of Appeal has repeatedly held the implied consent law does not create any constitutional right to have performed, or even be informed of, any of the three testing options. *See People v. Bloom*, 142 Cal.App.3d 310 (1983); *People v. Puccinelli*, 63 Cal.App.3d 534 (1976); *People v. Brannon*, 32 Cal.App.3d 971 (1973). The California Courts of Appeal have held the implied consent law does not create additional constitutional rights. Plaintiffs have presented no compelling reason the Court should not defer to this interpretation.

Generally, the federal courts defer to a state court's interpretation of its own laws unless that interpretation is untenable or amounts to a subterfuge to avoid federal review of a constitutional violation. *See Aponte v. Gomez*, 993 F.2d 705 (9th Cir. 1993). This Court concludes the state courts' interpretation of Cal. Veh. Code § 23157, viewed in the light of the Supreme Court's opinion in *Schmerber*, is not untenable or a subterfuge. Thus, this

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[1] This Court rejects Plaintiffs' alternate theory of § 1983 liability. Plaintiffs argue, in effect, the police created the exigent circumstance by not giving the choice in the first place. As a result, Plaintiffs contend, the emergency exception to the warrant requirement as articulated in *Schmerber* is inapplicable. *See* 86 S. Ct. at 1835-36.

The Court concludes this argument strains the definition of exigent circumstances. Plaintiffs overlook the fact that, in the case of a drunk driving arrest, the circumstances which justify a warrantless blood test are physiological in nature and unrelated to Defendant's compliance or non-compliance with Cal. Veh. Code § 23157.

Court defers to that interpretation. Accordingly, because Plaintiffs have failed to allege facts supporting a cause of action under 18 U.S.C. § 1983, Defendants' motion for judgment on the pleadings is GRANTED.

II.

SECOND CAUSE OF ACTION – INTERFERENCE WITH ENJOYMENT OF LEGAL RIGHTS

Defendants argue the facts as alleged by Plaintiffs do not state a cause of action under Cal. Civ. Code § 52 or 52.1 (the Bane Act) because Plaintiffs do not state the alleged interference was due to their "race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute." *Boccato v. City of Hermosa Beach,* 29 Cal.App.4th 1797, 1809 (1994). Plaintiffs respond by arguing (1) the suspect class requirement is not included in the language of the statute and (2) because this Court is not bound by the *Boccato* decision, it should independently interpret the requirements of the Bane Act.

Although Plaintiffs are correct in asserting the language of the Bane Act does not require class membership by an injured plaintiff, several California courts have either implicitly or explicitly recognized this requirement. *See, e.g., In re M.S.* 10 Cal.4th 698; *Boccato v. City of Hermosa Beach,* 29 Cal.App.4th 1797 (1994); *In re Joshua H.,* 13 Cal.App.4th 1734 (1993). As the court in *Joshua H.,* noted, "It was the 'inadequacy of existing law and the increase in crimes committed because of the victim's *minority status*' that prompted the Legislature to enact the Bane Act. (citation omitted)." 13 Cal.App.4th at 1748 n. 9

(emphasis added). The state courts have held the Bane Act to be a "hate crimes" statute which protects certain classes of persons, not the public as a whole.

Because the Court finds the state courts' interpretation of the Bane Act neither untenable nor a subterfuge, the Court defers to the interpretation of the state courts. *See Aponte*, 993 F.2d 705.

Plaintiffs fail to allege Defendants interfered with their legal rights due to Plaintiffs' "race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute," *Boccato* at 1809, therefore, Defendants' motion for judgment on the pleadings is GRANTED.

III.

THIRD AND FOURTH CAUSES OF ACTION
ARBITRARY DISCRIMINATION & ARBITRARY
DISCRIMINATION WITH THREAT OF VIOLENCE

Defendants argue Plaintiffs do not allege facts sufficient to state a claim for a violation of either Cal. Civ. Code § 51 (the Unruh Act) or § 51.7 (the Ralph Act) because Plaintiffs have not alleged membership in a protected class as defined under either of these statutes. Although the categories enumerated under the statutes are "illustrative rather than restrictive," *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 1152 (1991), this Court declines to extend the protection of the Unruh and Ralph Acts to persons arrested for drunk driving.

In *Harris*, the California Supreme Court observed four factors a court should look to in determining

whether a plaintiff who is not a member of any of the explicitly enumerated classes has stated a cause of action under the Unruh Act: (1) prior decisions, (2) the language of the statute, (3) the legitimate business interests of the business in drawing the distinctions it did and (4) the consequences of expanding the act to provide the protection requested. *Harris* at 1154-69.

Plaintiffs have not cited, nor has the Court found, any prior decision which supports extending the protection of these anti-discrimination statutes to drunk driving arrestees. In fact, the *Harris* court indicated its inclination to do the opposite – limit the Unruh Act's protection to the groups specifically mentioned in the statute. *Id.* at 1159 ("were we writing on a clean slate, the repeated emphasis in the language of sections 51 and 52 on the specific classifications of race, sex, religion, etc., would represent a highly persuasive, if not dispositive factor in our construction of the Act.").

Concerning the second factor, there is no language in either statute which supports recognizing persons arrested for drunk driving as belonging to a protected class. The Unruh Act protects persons discriminated against because of their "sex, race, color, religion, ancestry, national origin, or disability." Cal. Civ. Code § 51. The Ralph Act protects persons intimidated by threat of violence because of their "race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. . . . " Cal. Civ. Code § 51.7. The Court finds no justification in

the language of either statute for extending protection to persons arrested for drunk driving.[2]

Accordingly, the Court concludes persons arrested for drunk driving are not members of a class protected under either the Unruh Act or the Ralph Act. Defendants' motion for judgment on the pleadings is GRANTED.

IV.

FIFTH CAUSE OF ACTION – ASSAULT AND BATTERY

Under California law an assault is defined as "a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present." *Lowry v. Standard Oil Co.*, 63 Cal.App.2d 1, 6-7 (1944). A battery is defined as "a violation of an individual's interest in freedom from intentional unlawful, harmful or offensive unconsented contacts with his or her person." *Rains v. Superior Court*, 15 Cal.App.3d 933, 938 (1984). Plaintiffs assert the blood tests performed by Defendants constituted an assault and/or a battery because Plaintiffs' consent was obtained in a manner violative of the implied consent law, *i.e.*, Plaintiffs were not given the choice of a blood, breath or urine test.

The implied consent law states, "[a]ny person who drives a motor vehicle is deemed to have given his or her

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[2] Given the lack of support for Plaintiffs' position in the analysis of the first two *Harris* factors, the Court need not address the remaining factors in detail. Nevertheless, the Court notes expanding protection to the "class" of drunk driving arrestees would lead to absurd results. Thus, the fourth *Harris* factor weighs heavily against Plaintiffs' position.

consent to a chemical testing of his or her blood, breath or urine." Cal. Veh. Code § 23157(a)(1). Plaintiffs fit squarely within the terms of this statute and are deemed to have provided their consent to the chemical testing of their blood. Thus, assuming all facts as alleged are true, Plaintiffs have failed to state a cause of action for assault or battery. For purposes of assault, Defendants' intent could not be unlawful; for purposes of battery, the touching was consensual. Accordingly, Defendants motion for judgment on the pleadings is GRANTED.

Since each of the court's rulings is based upon a matter of law, the court does not grant leave to amend.[3]

Date: 10-18-96

/s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES
DISTRICT JUDGE

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[3] The Court has reviewed plaintiff's reliance on *Hammer v. Gross*, 932 F.3d 842 (9th Cir. 1991), and concludes it does not change this result. Additionally, plaintiff's reliance on the Equal Protection Clause, mentioned for the first time at oral argument, does not change the result.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID SCOTT NELSON; MAURICIO BAEZ FERNANDEZ, on behalf of themselves and on behalf of others similarly situated, Plaintiffs-Appellants, v. CITY OF IRVINE, CHIEF OF POLICE CHARLES S. BROBECK, OFFICER TROY GIELESH, OFFICER SHIRLEY SUMNER, OFFICER ROBERT LANDMAN, CALIFORNIA FORENSIC PHLEBOTOMY, INC. Defendants-Appellees.	No. 96-56813 D.C. No. CV-96-00199-GLT ORDER (Filed Jun. 9, 1998)

Before: BOOCHEVER and KLEINFELD, Circuit Judges, and TANNER, District Judge.*

Appellant's petition for rehearing is denied.

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* Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

(2)

FILED
AUG 24 1998

No. 98-163

In The

Supreme Court of the United States

October Term, 1997

CITY OF IRVINE, CHIEF OF POLICE CHARLES S. BROBECK, OFFICER TROY GIELISH, OFFICER SHIRLEY SUMNER, OFFICER ROBERT LANDMAN, CALIFORNIA FORENSIC PHLEBOTOMY, INC.,

Petitioners,

vs.

DAVID SCOTT NELSON and MAURICIO BAEZ FERNANDEZ, on behalf of themselves and on behalf of others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the police violate the Fourth Amendment by requiring a person arrested on probable cause for drunk driving to take a blood test when that person has agreed or consented to an available breath or urine test, where the State's implied consent statute grants the choice of test to the arrestee.

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United States Constitution Cited:

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STATEMENT OF THE CASE

While the factual background presented by petitioners is accurate, it is not complete. Since the lawsuit was dismissed at the pleading stage, and before the size of the class and number of class members were determined, it is misleading to suggest that only two persons were forced to take a blood test by the Irvine Police Department. At this point, it will suffice to say that, according to the Complaint, hundreds or thousands of arrestees were forced to take a blood test under similar circumstances.

Also relevant but missing from the petition is California's implied consent law which provides:

> If the person is lawfully arrested for driving under the influence of an alcoholic beverage, **the person has the choice of whether the test shall be of his or her blood, breath or urine**, and the **officer shall advise the person that he or she has that choice**. If the person arrested either is incapable, or states that he or she is incapable, of completing any chosen test, the person shall submit to the person's choice of the remaining tests or test, and the officer shall advise the person that the person has that choice. (California Vehicle Code § 23157(a)(2)(A).)

This is important because it distinguishes California from most of the other states which petitioners discuss.

REASONS FOR DENYING THE WRIT

Petitioner's version of the "Question Presented" follows logically from the Ninth Circuit's opinion in this case like the "end of the world" follows from a teenager's discovery of a

pimple on prom night. In other words, as can be seen by comparing the "Question Presented" as set forth by petitioners with the version offered by respondents, petitioners have overstated the impact of the Ninth Circuit's decision. While certainly correcting some archaic California state court decisions which misapplied Fourth Amendment law to the seizure of a blood sample, the Ninth Circuit's decision does not nullify the implied consent laws in other states, directly contradict the California Supreme Court, raise a substantial question of law that this court has a compelling need to address at this time, or unnecessarily impair law enforcement.

What is missing from the petitioners' version of the "Question Presented" are the conditions and limitations the Ninth Circuit placed on its holding. First of all, the Ninth Circuit did not hold that an arrestee has a Fourth Amendment right to a test of his choice. Rather, the Ninth Circuit found a Fourth Amendment violation only in the specific situation where the arrestee agreed to take a breath or urine test, which was available, and the officer still forced him to take a blood test. (Appendix to Petition, 13a-14a.) Some of the arrestees identified in the complaint preferred to take a breath test but were afraid to express their choice to the officer. For example, one of the arrestees was told that he would be held in jail for two days if he did not agree to take a blood test. (Appendix to Petition, 4a.) It is not clear from the Ninth Circuit's decision that such arrestees would be entitled to state a claim under the Fourth Amendment.

Secondly, the Ninth Circuit held that it is unreasonable under the Fourth Amendment to compel an arrestee to take a blood test only if the arrestee has agreed to a breath or urine test "which is available and of similar evidentiary value. . . ." (Appendix to Petition, 25a.) These limitations undercut petitioners' dire predictions as set forth in greater detail below.

I.

THE NINTH CIRCUIT'S OPINION DOES NOT NULLIFY THE IMPLIED CONSENT LAWS OF OTHER STATES.

Petitioners note that some implied consent laws permit the officer to choose which of the tests to administer. The Ninth Circuit's decision does not directly invalidate such laws. The Ninth Circuit concerned itself with California, whose legislature has, through the implied consent law, deemed blood, urine and breath tests as functionally equivalent. (Appendix to Petition, 8a-9a.) There indeed might be a valid constitutional challenge to some of the implied consent laws which mandate a blood test, but the instant petition is not the proper vehicle to challenge such law and there is no factual record regarding the circumstances of those other states. Accordingly, there is no need for this court to grant certiorari because of the possible impact of the Ninth Circuit's decision on the implied consent laws of various states.

II.

THE NINTH CIRCUIT'S OPINION DOES NOT EXPRESSLY CONFLICT WITH THE CALIFORNIA SUPREME COURT'S CURRENT DECISIONS.

California state courts have misconstrued *Schmerber v. California*, 384 U.S. 757 (1966) for years. The problem started with *People v. Superior Court* (*Hawkins*), 6 Cal. 3d 757 (1972). There, the police took a suspected drunk driver to a hospital and without his consent obtained a blood sample. The California Supreme Court summarized the holding of as follows:

> It is clear that the Fourth Amendment does not bar a compulsory seizure, without a warrant, of a person's

> blood for the purposes of a blood alcohol test to determine intoxication, provided that the taking of the sample is done in a medically approved manner, **is incident to a lawful arrest**, and is based upon the reasonable belief that the person is intoxicated. (*Hawkins*, 6 Cal. 3d at p. 761 (emphasis added).)

In its most recent word on the subject, the California Supreme Court still spoke of the authority to seize a blood sample as being rooted in the "incident to arrest" exception to the warrant requirement. (*Mercer v. Department of Motor Vehicles*, 53 Cal. 3d 753, 760 (1991).)

This Court made clear in *Winston v. Lee*, 470 U.S. 753, 759 (1985), the blood test in *Schmerber* was permissible only "because the case fell within the exigent-circumstances exception to the warrant requirement." Other decisions of the California courts have recognized the mistaken reliance on the "incident to arrest" exception. For instance, in *People v. Trotman*, 214 Cal. App. 3d 430, 436 (1989), the court noted the aforementioned deficiency in *Hawkins's* analysis of *Schmerber*.

In *Winston*, the Court explained that the constitutionality of the seizure of a blood sample, like other bodily intrusions, must be subjected to a balancing test:

> The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure.

(*Id.* at p. 760.) Among the factors described by the Court in applying this balancing test were the extent and magnitude of the intrusion upon the arrestee, whether the search was more

intrusive than reasonably necessary to accomplish its goals, and the state's interest in obtaining reliable evidence that would not otherwise be available. (*Id.* at pp. 759-763.)

To date, the California Supreme Court has not addressed the *Schmerber* decision from the perspective of "exigent circumstances" nor has it engaged in the balancing test set forth in *Winston v. Lee*. Presumably, were the California Supreme Court to address the issue raised in the instant case from that perspective and apply the balancing test, it would agree with the Ninth Circuit decision.

Another California state court did reach a conclusion similar to that reached by the Ninth Circuit. In *People v. Fiscalini*, 228 Cal. App. 3d. 1639 (1991), the DUI arrestee was advised that he had to submit to a breath, urine or blood test. He chose the urine test and provided a sample. Later, the officer requested he also provide a blood sample, which the officer thought would be the most accurate test for alcohol and which could also detect the presence of drugs. After Fiscalini refused to provide a blood sample, the officer took one by force. Applying *Winston* and *Schmerber*, the court found that the seizure was unreasonable:

> [T]he People here did not demonstrate sufficient need to withdraw Fiscalini's blood without his consent after he provided a urine sample. . . . [T]he officer's opinion blood was the best test for detecting alcohol was not sufficient to show any need to take Fiscalini's blood sample after he already provided a urine sample. Under the implied consent law a person lawfully arrested for driving under the influence of alcohol has the choice of submitting to a blood, breath or urine test. Enactment of the implied consent law is tantamount to government acknowledgment a urine test is functionally

> equivalent of a blood test for evidentiary purposes. . . . **Thus, having already obtained one sample from Fiscalini with his consent, the government did not demonstrate any need to force him to undergo a second intrusion.** (*Fiscalini*, 228 Cal. App. 3d at pp. 1644-1645 (citations omitted) (emphasis added).)

The court similarly held since there was no showing the urine test would not have sufficed to determine the presence of drugs, an additional blood test was unnecessary. (*Id.* at pp. 1645-1656.)

Put another way, *Fiscalini* held that no exigent circumstances made it necessary for the officer to obtain a blood sample without a warrant since he had already obtained a perfectly acceptable urine sample. Applying the *Winston* factors, the taking of a blood sample was found to be more intrusive than necessary. *Fiscalini* also recognized that the implied consent law is significant to the question of the constitutionality of compelled blood tests:

> [T]he existence of the implied consent law bears upon the element of the government's need for the blood sample under the test articulated in *Winston v. Lee* [citation omitted]. . . .

(*Id.* at p. 1645, n.7.) That statute reflects the government's acknowledgment that a blood, breath and urine test are all functionally equivalent for purposes of determining blood alcohol level. (*Id.* at p. 1645.)

In *Fiscalini*, the court concluded that the police could not compel a DUI arrestee who had already submitted to a urine test to take a blood test, but did not decide whether the same result would apply if that person agreed to take a urine (or

breath) test but the officer made him take a blood test instead. This latter question was the one decided by the Ninth Circuit and the decision was quite consistent with that reached in *Fiscalini*.

Petitioners cite other state supreme court decisions that supposedly conflict with the Ninth Circuit's holding. These decisions can best be addressed by quoting petitioners' assertion that the other state supreme court decisions

> are indicative of the importance state legislatures and state supreme courts place on permitting the law enforcement agency to select the chemical testing option it deems appropriate for the circumstances.

(Petition, p. 12.) Notwithstanding these other states, California has not deemed it important to permit law enforcement agencies to select the chemical testing option. To the contrary, California has deemed it important that the **arrestee** be permitted to select which test to choose. The Ninth Circuit's decision is partially based upon this legislative calculation.

III.

THE NINTH CIRCUIT'S OPINION DOES ADDRESS A QUESTION LEFT OPEN IN *SCHMERBER v. CALIFORNIA* BUT ONE WHICH THIS COURT NEED NOT ADDRESS AT THIS TIME SINCE THE QUESTION CAN BE RESOLVED BY APPLYING THE FACTORS SET FORTH IN THIS COURT'S OPINION IN *WINSTON v. LEE*.

Petitioners are correct that in *Schmerber v. California*, 384 U.S. 757 (1966), this Court did leave open the question whether the Fourth Amendment required the police to respect the request

of a drunk driving arrestee to take a breath or urine test. But, it is not necessary for this Court to address the issue *Schmerber* left open because *Winston v. Lee, supra*, already adequately did so. As noted above, *Winston v. Lee* set forth the balancing test to be applied in determining the reasonableness under the Fourth Amendment of a bodily intrusion. Those factors were fairly and reasonably applied by the Ninth Circuit. (Appendix to Petition, pp. 6a-9a.) Petitioners make no effort to question the Ninth Circuit's application of the factors. For instance, petitioners do not explain why a blood test would not be more intrusive than reasonably necessary to accomplish its goals in view of the fact that an equally reliable breath test is available and the arrestee is willing to take it. Nor do petitioners explain how the state's interest in obtaining reliable evidence that would not otherwise be available is vindicated by forcing arrestees who are willing to take a breath test to take a blood test. It is indeed strange, but perhaps not surprising, that petitioners attack the Ninth Circuit's decision without even bothering to discuss *Winston v. Lee*, the most relevant recent decision of this Court.

IV.

THE NINTH CIRCUIT'S OPINION DOES NOT UNNECESSARILY IMPAIR LAW ENFORCEMENT'S ABILITY TO COMBAT DRUNK DRIVING.

When in doubt, beat the drums of war. Petitioners argue that the lower court's decision will hamstring the police in their campaign to "gather the evidence necessarily to wage the war against drunk driving." (Petition, p. 15.) Contrary to petitioners' extravagant assertions, the Ninth Circuit's decision does not place drunk driving arrestees in control of the evidence. It simply puts them "in control" of their own bodies to the extent such control can be reconciled with the society's need to gather reliable evidence of intoxication. Since California deems all three

blood alcohol tests equally reliable, the police have no need for a blood sample if they can obtain a breath or urine sample.

Petitioners fear arrestees will manipulate the system to cause delay, but there is no evidence in the record that any significant delay is caused if the arrestee chooses one test over the other. Even if one test took a little longer than the others to complete because of some unique circumstances present in a particular city, there is no evidence in the record that an arrestee would be privy to such information. Thus, petitioners' speculation that an arrestee will demand "a blood test when the officer certified to administer the test is an hour away" is ludicrous. (Petition, p. 15, n.2.) How would the arrestee know that?

Moreover, petitioners argue some agencies may "prefer" not to give certain tests for economic reasons. It is likely the government could save a lot of money if it did not need to comply with the Fourth Amendment. No doubt "rural police agencies" which would prefer not to give a blood test might also prefer not to spend valuable police man-hours gathering evidence to establish probable cause when it would be much cheaper to make an arrest without probable cause. This is not a consideration worthy of any significant weight.

Petitioners finally argue that some jurisdictions might consider the breath test to be unreliable. However, the Ninth Circuit's decision was premised on the California implied consent law which treats all three tests as equally reliable. Thus, the question whether the breath test is or is not reliable is not before the Court.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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